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In The
Supreme Court of the United States
October 2004 Term

JON E. OZMINT, Director, South Carolina Department of Corrections,

Petitioner,

vs.

LARRY EUGENE HALL,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court of South Carolina

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CAPITAL CASE

QUESTIONS PRESENTED

I.

WHETHER THE SOUTH CAROLINA SUPREME COURT MISAPPLIED STRICKLAND V. WASHINGTON AND PAYNE V. TENNESSEE WHEN IT CONCLUDED THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE SOLICITOR'S PENALTY PHASE ARGUMENT COMPARING THE WORTH OF THE CONVICTED DEFENDANT WITH THE WORTH OF THE LIVES OF THE MURDER VICTIMS?

II.

WHETHER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE FORBIDS PROSECUTORIAL ARGUMENT IN A CAPITAL CASE WHICH REFERENCES THE WORTH OF A VICTIM AND THE WORTH OF A DEFENDANT?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA 1

CITATION TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. PROCEDURAL HISTORY 2

B. PRIOR PROCEDURAL AND FACTUAL HISTORY 4

REASONS WHY CERTIORARI SHOULD BE GRANTED 7

1. The South Carolina Supreme Court incorrectly concluded that Payne v. Tennessee, 501 U.S. 808 (1991) and the federal constitution forbids penalty phase prosecution argument which compares the worth of a victim's life with that of a convicted murder defendant. 7

2. Trial Counsel in 1991 cannot be deemed deficient in not anticipating this apparent 2004 change based upon this misinterpretation of Payne. 8

3. A Conflict Exists Among Jurisdictions On Whether Victim-Defendant Comparisons or The Worth of the Victim Can Be Argued Under Payne v. Tennessee. 19

4. Summary 25

CONCLUSION 27

APPENDIX I

A. Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (August 9, 2004) . . . . . -A-

APPENDIX II

A. Hall v. Catoe, Order Denying Petition for Rehearing (S.C.S.Ct. September 9, 2004) . . . . . -P-

TABLE OF AUTHORITIES

FEDERAL CASES

Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996) 13

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 16

Burket v. Angelone, 208 F.3d 172 (4th Cir.2000) 10

Clabourne v. Lewis, 64 F.3d 1373, 1383 (9th Cir. 1995) . . . 14

Darden v. Wainwright, 477 U.S. 168 (1986) 13, 26

Foster v. Schomig, 215 F.3d 687, 693 (7th Cir. 2000) 11

Grey v. Bowersox, 281 F.3d 749 (8th Cir. 2002) 23

Hall v. South Carolina, 512 U.S. 1246 (1994) 6

Humphries v. Ozmint, 366 F.3d 266 (4th Cir. 2004) 17,19

LaGrand v. Stewart, 133 F.3d 1253, 1271 (9th Cir. 1998) . . 11

Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993) 11

Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) 11

Moore v. Deputy Commissioners, SCI-Huntington, 946 F.2d 236, 245, fn. 6 (3rd Cir. 1991) 11

Payne v.Tennessee, 501 U.S. 808 (1991) . . . . . *passim*

Richardson v. Marsh, 481 U.S. 200, 211, (1987) 14

Sherrill v. Hargett, 184 F.3d 1172 (10th Cir. 1999) 11

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) 9

Strickland v. Washington, 466 U.S. 668 (1984) ... 1, 7, 10, 11

U.S. v. McVeigh, 153 F.3d 1166 (10th Cir.1998) 22

Wiley v. Puckett, 969 F.2d 86, 105 (5th Cir.1992) 22

STATE CASES

Curtis v. South Carolina, 305 S.C. 225, 226, 407 S.E.2d 643, 644 (1991) 10

Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) 11

Humphries v. State, 351 S.C.362, 570 S.E.2d 160 (2002) ... 11

Hyde v. State, 778 So.2d 199 (Ala.Cr.App.1998) 22

Jackson v. State, 33 S.W.3d 828 (Tex.Crim.App.2000) 19

Price v. State, 725 So.2d 1003, 1034 (Ala.Cr.App.1997) ... 23

Smith v. State, 797 So.2d 503 (Ala.Cr.App. 2000) 22

State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) 14

State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975) 13

State v. Haselden, 577 S.E. 2d 594 (2003) 21

State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) 14

State v. Koskovich, 168 N.J. 448, 776 A.2d 144 (2001) ... 23

State v. Hall, 312 S.C. 95, 439 S.E.2d 278 (1994) 6

State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998) 13

State v. Ringo, 30 S.W.3d 810 (Mo. banc 2000) 22

State v. Roberts, 948 S.W.2d 577, 604 (Mo. banc 1997) ... 22

State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) . 12

State v. Storey, 901 S.W.2d 886 (Mo. 1995) 16, 22

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 14

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

U.S.CA. Const. Amend. 8 8

STATE STATUTES

S.C. Code Ann. § 16-3-26 (1976) 5

Petitioner, Jon E. Ozmint, Director of the South Carolina Department of Corrections, through the Attorney General of South Carolina, hereby makes a Petition for a Writ of Certiorari to the Supreme Court of South Carolina. The South Carolina Supreme Court reversed the denial of state post-conviction relief concluding that Larry Hall's counsel was ineffective for not objecting to the solicitor's closing argument which included references to the worth of the victims and the worth of the capital defendant. The state court remanded the matter for a new capital sentencing proceeding.

Petitioner asserts that this decision misapplied the precedent of this Court in Strickland v. Washington, 466 U.S. 668 (1984) and Payne v. Tennessee, 501 U.S. 808 (1991). In addition, there is a conflict among similar jurisdictions on the treatment of similar prosecutorial arguments in capital cases. For the reasons set forth below, Petitioner requests that certiorari be granted.

CITATION TO THE OPINIONS BELOW

The August 9, 2004 decision of the Supreme Court of South Carolina reversing the denial of state post-conviction relief and remanding the matter for a new capital sentencing proceeding is published as *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004) and attached to the Petition as **Appendix I**. The Order of the South Carolina Supreme Court denying the petition for rehearing on September 9, 2004 is unpublished and is set forth in appendix to this Petition as **Appendix II**.

JURISDICTION

The Order of the Supreme Court of South Carolina granting state post-conviction relief on the basis of a denial of the Sixth Amendment was entered on August 9, 2004. A

petition for rehearing was denied on September 9, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

1. This matter involves the Sixth Amendment to the United States Constitution, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy . . . the right to have the assistance of counsel for his defense."

2. This case also involves the Fourteenth Amendment to the United States Constitution which provides in pertinent part that "no. . . State [may] deprive any person of life , liberty, or property, without due process of law. . . ."

3. This case also involves the Eighth Amendment to the United States Constitution which provides that "excessive bails shall not be required , nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

A. Procedural History.

This matter comes before this Court by an Application for State Post-Conviction Relief by South Carolina inmate death row inmate Larry Eugene Hall, the Respondent herein. Hall made an Application for Post-Conviction Relief dated March 17, 1995. On June 2-3, 1997 an evidentiary hearing was held in the matter before the Honorable Larry R. Patterson, Presiding Judge. Hall was present and represented by John H. Blume, Teresa L. Norris, and Hilary Sheard of the Center for Capital Litigation. The State was represented by Donald J. Zelenka of the Attorney General's Office. Subsequent to the hearing, depositions were completed.

On March 6, 2000, Judge Patterson filed the Order of Dismissal. App. 4033-4173. A timely notice of appeal was filed on April 5, 2000. App. 4175.

The Petitioner made a petition for writ of certiorari raising thirteen questions presented. Among the questions presented was the following issue pertinent to this appeal:

> VIII. WAS PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF SOUTH CAROLINA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS, AS A RESULT OF COUNSEL'S FAILURE TO PRESERVE PETITIONER'S PROCEDURAL RIGHTS DURING TRIAL, OBJECT TO OBJECTIONABLE RULINGS, AND ADEQUATELY PRESERVE THE RECORD FOR APPEAL?

The Petitioners made a return on February 2, 2001. On January 24, 2002, The South Carolina Supreme Court granted certiorari limited to three questions within the questions presented. Among those issues was the following:

> WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE SOLICITOR'S ARGUMENT COMPARING THE WORTH OF PETITIONER WITH THE MURDER VICTIMS? (QUESTION VIII (A) (5) ON CERTIORARI)

Briefing followed.

On August 9, 2004, the Supreme Court of South Carolina entered its opinion. Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004) The state court held that Hall was denied his constitutional right to effective assistance of counsel when his trial counsel failed to object to the solicitor's comparison between the worth of Hall's life and the lives of the victims. The court concluded that the solicitor impermissibly compared Hall's life to the victims' lives. It found that the solicitor's comparison (1) was so emotionally inflammatory that it became a material part of the jury's deliberation process; (2) unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall's life was worth less than the lives of his victims; (3) is totally unrelated to the circumstances of the crime; and (4) is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victims or the victims' family.

The State made a petition for rehearing on August 24, 2004. Rehearing was denied by the Supreme Court of South Carolina on September 9, 2004. Appendix II. This petition follows.

A. PRIOR PROCEDURAL AND FACTUAL HISTORY

1. The Crime

As summarized by the Supreme Court, Hall's crime met the statutory criteria for imposition of the death penalty in South Carolina. In July 1991, Hall committed a series of crimes in an Easley Wal-Mart parking lot. To begin, Hall robbed and sexually assaulted his first victim at gunpoint. Hall then ordered her to walk to the back parking lot with him. A Wal-Mart employee noticed Hall's strange behavior and drove a truck through Hall and the victim's path. Hall allowed her to

escape and then walked into the woods behind the store waving his gun in the air.

A half hour later, Hall approached two teenage girls, who were sisters, in the back parking lot. In front of numerous witnesses and without provocation, Hall shot and killed the two girls. When the police arrived and finally cornered Hall, he challenged the police with a piece of wood and dared the police to shoot him.

2. The Trial

Larry Eugene Hall, #4821, is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Pickens County. Hall was indicted at the November 1991 term of the Court of General Sessions for Pickens County for two (2) counts of resisting arrest (91-GS-39-1350)(Hall unlawfully resisted the efforts of Berry Seaborne and Wendell Hunter in their attempts to arrest him and assaulted both officers), armed robbery (91-GS-39-1348)(On or about July 16, 1991, the Hall committed armed robbery against Melinda Brackett), murder (91-GS-39-1341)(On or about July 16, 1991, Hall killed Lori Murphree by shooting her with a handgun), kidnapping (91-GS-39-1351)(On or about July 16, 1991, Hall kidnapped Melinda Brackett), murder (91-GS-39-1346)(On or about July 16, 1991 Hall killed Wendy Murphree by shooting her with a handgun), and criminal sexual conduct (91-GS-39-1340(Criminal sexual conduct, first degree)(On or about July 16, 1991, Hall sexually assaulted Melinda Brackett). He was represented by Christopher G. Olson, Esquire, and Dallas D. Ball, Esquire.

The State gave notice of its intent to seek the death penalty one each murder charge pursuant to S.C. Code Ann. § 16-3-26 (1976). The particular aggravating factors were: "two

or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct,"[S.C. Code Ann. § 16-3-20(C)(a)(2)] "murder was committed while in the commission of robbery while armed with a deadly weapon"[S.C. Code Ann. § 16-3-20(C)(a)(1)(d)], "murder was committed while in the commission of kidnapping" [S.C. Code Ann. § 16-3-20(C)(a)(1)(b)], and "murder was committed while in the commission of criminal sexual conduct,"[S.C. Code Ann. § 16-3-20(C)(a)(1) pursuant to S.C. Code Ann. § 16-3-20(C)(a)(1)(a)].

A jury trial was held on January 16-28, 1992 at the conclusion of which Hall was found guilty of the charges. After a separate sentencing hearing, the jury found the existence of all the statutory aggravating factors beyond a reasonable doubt. The jury recommended a sentence of death. He was sentenced by the Honorable C. Victor Pyle to confinement for twenty-five (25) years for armed robbery, thirty (30) years for criminal sexual conduct in the first degree, ten (10) years for resisting arrest, thirty (30) years for kidnapping, and death for two (2) counts of murder.

3. The Direct Appeal

Hall filed a timely Notice of Intent to Appeal. On January 10, 1994, the South Carolina Supreme Court issued its Opinion in this matter affirming the conviction and sentence. See, State v. Larry Eugene Hall, 312 S.C. 95, 439 S.E.2d 278 (1994). Hall filed a Petition for Rehearing with the South Carolina Supreme Court dated on or about January 19, 1994. The Petition for Rehearing was denied.

A Petition for Writ of Certiorari to the South Carolina Supreme Court in the United States Supreme Court was filed on May 4, 1994. On June 27, 1994 the United States Supreme

Court denied the Petition for Writ of Certiorari. Hall v. South Carolina, 512 U.S. 1246 (1994).

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The South Carolina Supreme Court incorrectly concluded that Payne v. Tennessee, 501 U.S. 808 (1991) and the federal constitution forbids penalty phase prosecution argument which compares the worth of a victim's life with that of a convicted murder defendant.

The Petitioner asks this Court to grant a petition for writ of certiorari based upon the failure of the Supreme Court of South Carolina reasonably apply the precedent of this Court in Strickland v. Washington, 466 U.S. 668 (1984) and misapplied the constitutional holding of Payne v. Tennessee, 501 U.S. 808 (1991).

In its opinion, the South Carolina Supreme Court found that Hall's trial counsel was ineffective for failing to object to the Solicitor's penalty phase closing argument. The state court found that the State had improperly made a comparative inquiry as to the worth of the victim as compared to that of Hall. The court found that an objection should have been made in 1991 to the following comment by the prosecutor:

> I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the life of Wendy Murphree and Lori Murphree was worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth at least the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps.

App. p 1568, (R.1537.) The state court concluded that this portion of the Solicitor's argument "asked **the jury** to compare the **worth** of Hall's life with that of his victims." Hall v. Catoe, (emphasis in original). Implicitly, the state court concluded the argument violated this Court's mandates in Payne because the solicitor impermissibly compared Hall's life with that of his victims. He contends that it violated his right to due process whereby the solicitor developed an arbitrary formula that if the jury finds Hall's life worth less than his victims', then the jury could reach no other conclusion than that the death penalty is justified. 360 S.C. 353, 364, 601 S.E.2d We submit that this was clear error in the state court's constitutional analysis under the Sixth, Eighth and Fourteenth Amendments.

Hall and implicitly now the Supreme Court of South Carolina essentially resolve that the prosecution penalty phase argument was bad under Payne, particularly identifying at trial the following head note 8 in Payne v. Tennessee, supra:

> Victim impact evidence is not generally offered to encourage comparative judgments that a capital defendant **whose victims was an asset to the community** is more deserving of punishment than a defendant **whose victim is perceived to be less worthy**, but is designed instead to show each victim's uniqueness as an individual human being, whatever, the jury might think of the loss to the community resulting from the death. U.S.CA. Const. Amend. 8.

111 S.Ct. at 2598, 2607.

In Payne, the U.S. Supreme Court concluded:

> For the reasons discussed above, we now reject the view-expressed in Gathers - that a state may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We re-affirm the view expressed by Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934):
>
> > "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Payne, 111 S.Ct. at 2609.

"There is nothing unfair about allowing the jury to bear in mind the harm [victim impact evidence that the child missed his sister and mother] at the same time as it considers the mitigating evidence introduced by the defendant." Payne, 111 S.Ct. at 2609. The Court in Payne held that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, "the Eighth Amendment erects no per se bar." 111 S.Ct. at 2609. As authorized in Payne, supra, the prosecutor's argument was acceptable argument that kept "the balance true." Payne, supra, Snyder v. Massachusetts, supra. Because the state court erroneously concluded that the Constitution erects a bar to prosecutorial comment on the existence of the worth of a victim's life, certiorari is warranted.

2. Trial Counsel in 1991 cannot be deemed deficient in not anticipating this apparent

2004 change based upon this misinterpretation of Payne.

Until this instant decision in Hall, neither the South Carolina Supreme Court nor the United States Supreme Court has ever held that victim-defendant comparisons are improper. In fact, the state court wholly misapprehended the standard of review under Strickland v. Washington, 466 U.S. 668 (1984) as applied in its precedent of a two-step process in evaluating defense counsel conduct at the time of the trial and not retrospectively.[1] A fundamental tenet in the evaluation of

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[1]Under the first prong, a criminal defendant must establish that counsel's performance "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In reviewing counsel's performance, "a strong presumption [exists] that counsel's conduct falls within the wide range of reasonable professional assistance," Id. at 689, and that counsel "made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir.2000).

The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland, supra. The purpose of the effective assistance guarantee is simply to ensure that criminal defendants receive a fair trial. Id. "In PCR proceedings, the burden of proof is upon petitioner to prove the allegation of his application." Curtis v. South Carolina, 305 S.C. 225, 226, 407 S.E.2d 643, 644 (1991).

ineffective counsel claims is that of so-called contemporary assessment: counsel's acts are to be judged as of the time counsel was required to act. The principle stems from Strickland v. Washington, 466 U.S. 668, 690 (1984) which recites that counsel's performance is to be viewed as of the time of counsel's conduct. Simply put, how would reasonable counsel in 1991 have acted when presented with the prosecution's closing argument in 1991, not 2004. Since this was presented to the state court in a Sixth Amendment format, it is implicit to recognize that trial counsel in 1991 could not have anticipated this apparent 2004 change in the law that the state court is now seeking to retroactively apply. See, Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (Court does not require attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial). A counsel is not ineffective in failing to forecast changes or advances in the law. Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) (counsel can't be expected to anticipate later decisions); LaGrand v. Stewart, 133 F.3d 1253, 1271 (9th Cir. 1998) (judge at time required to act); Foster v. Schomig, 215 F.3d 687, 693 (7th Cir. 2000) (same). Sherrill v. Hargett, 184 F.3d 1172 (10th Cir. 1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993); Moore v. Deputy Commissioners, SCI-Huntington, 946 F.2d 236, 245, fn. 6 (3rd Cir. 1991). In fact, Strickland mandates that this assessment be made from counsel's perspective at the time of the trial, not 20/20 hindsight.

The Supreme Court of South Carolina as recently as 2002 affirmed an argument which did not directly compare the worth of the victim and defendant, but did present the jury with various characteristics of both in making their determination of sentence in Humphries v. State, 351 S.C.362, 570 S.E.2d 160 (2002). Important to this analysis in Hall as to why this is an obvious change in the law that could not have been anticipated by defense counsel in 1991 and thus not deficient, the 2002 Humphries Court stated:

> We agree with the PCR court's finding that the solicitor's argument does not suggest that the Smith's life is worth more than the Petitioner's life. We do recognize, however, that the solicitor compared the lives of Smith and the Petitioner based on the evidence presented. We now consider whether or not such a comparison is proper. Petitioner asserts this Court has answered this question already in State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994). We disagree, and believe Petitioner has misconstrued our decision in Southerland. In Southerland, the State did not offer any victim impact evidence, but the defendant wanted to introduce evidence of the victim's bad character. This Court held that "Payne prohibits this use of comparative character analysis." Id. at 385, 447 S.E.2d at 867. The Court recognized, "[w]hile evidence of harm caused by the defendant may include evidence of the victim's character, it is not offered to encourage comparative character analysis." Id. **Upon examination of Payne, and other post-Payne precedent, we are convinced the Court was referring to comparative character analysis between the victim and other members of the community, *not comparisons between the defendant and the victim*. [FN9]**

Humphries, at 166-167 (emphasis added). If the state court in 2002 was of the opinion that there was no constitutional error in victim-defendant comparisons, based upon its reasonable review of "Payne and post-Payne precedent," it is implicit that

1991, counsel was reasonable in making the same assessment in 1991![2]

The state court misapprehended the law in that it erroneously held that Hall had received ineffective assistance of counsel because the Solicitor's argument was not improper in 1991.[3] In reviewing prosecution closing arguments, the state court had held that in making closing arguments, a prosecution argument must not appeal to the personal biases of the jurors, not be calculated to arouse the jurors passions and prejudices, and attorneys should stay within the record and its reasonable inferences.

In reviewing prosecution arguments, a reviewing court must consider the argument in its entirety to determine if the references so infected the trial with unfairness so as to deprive the defendant of due process, Darden v. Wainwright, 477 U.S. 168 (1986). See, State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); see also State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998) (demonstrating appellate review of a trial judge's denial of defendant's mistrial motion is governed by abuse of discretion standard). In Bennett v. Angelone, 92 F.3d 1336, 1349-50 (4th Cir. 1996), the Court found that desiring not to

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[2]Similarly, it goes hand in hand with this analysis that the prosecutor in 1991 was acting reasonably and zealously in making this argument without restraint from a reasonable analysis of "Payne and post-Payne precedent." Humphries, supra.

[3] During the post-conviction relief hearing, the defense counsel had reviewed the record and could not locate any reference "to the comparative worth of the victims contrasting that with the defendant." PCR Tr. p. 504, ll. 21-23. App. p. 2856. No specific reference had been referred to in any of Hall's pleadings prior to or during the time of the post-conviction relief hearing.

antagonize the jury and appear as the "good guys" justified a failure to object to the prosecution's religiously loaded penalty phase statements. Accord, Clabourne v. Lewis, 64 F.3d 1373, 1383 (9th Cir. 1995)(no error - counsel may have had many reasons for not objecting or interrupting during closing). The state court below, though, takes the prosecutor's argument out of context.

In South Carolina, evidence of victim impact of a murder is a legitimate consideration for a jury. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991); Payne v. Tennessee, 501 U.S. 808 (1991). In State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998), the Court held that photographs of a deceased "unborn child" were properly admitted under Payne. "Photographs may be offered as victim impact evidence to show something of the victim's life." "Victim impact evidence is clearly admissible because it slows the victim's uniqueness as an individual so long as it does not render the trial unfair." State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)(photographs showing the victim at different places on vacation, Christmas decorations in her yard, holding her grandchild, and fishing were admissible to show her uniqueness as an individual). "Victim impact evidence is clearly admissible because it slows the victim's uniqueness as an individual so long as it does not render the trial unfair." State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)(photographs showing the victim at different places on vacation, Christmas decorations in her yard, holding her grandchild, and fishing were admissible to show her uniqueness as an individual).

Juries are presumed to follow the trial court's instructions. See, e.g., Richardson v. Marsh, 481 U.S. 200, 211, (1987). The state court ignored this fundamental concept in its assessment. In addition to the closing arguments by the prosecution and defense, the jury in Hall's penalty phase was

directed to consider not only of the evidence in aggravation, but evidence in mitigation that the jury was sworn to consider prior to its decision. App.p. 1599-1609.[4] In addition, the trial judge directed the jury that "before you decide on the imposition of a life sentence, it is not necessary for you to find an existence of an alleged statutory mitigating circumstance or for that matter any mitigating circumstance, and the defendant has no burden of proving the existence of any one or more mitigating factors. App.p. 1605-06. Further, the trial judge advised the jury about the statutory mitigating circumstances that the jury was to consider including: the defendant was under a mental or emotional disturbance when the crime was committed, the capacity of Hall to appreciate the criminality of his conduct was substantially impaired, and the age and mentality of the defendant. App.p. 1606. In addition to being advised not to take passion or prejudice into their considerations, the jury was directed that "both the state and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in this case and that you will follow the law as I have given it to you in determining your verdict." App.p. 1607, ll. 2-9.

There was probative evidence to support the state PCR Judge's findings and conclusion that there was no "deficient performance" or "prejudice" under Strickland. App. pp. 4129-31. The PCR Court found that neither the intent of the prosecution comment nor the effect of it would have caused the jury, to a reasonable likelihood, to have avoided consideration of the evidence and instruction and to have based their decision solely upon a balancing of comparative worths. Both his

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[4] "You may consider as a mitigating factor any aspect of the defendant's character or record and any circumstances of the offenses which the defendant proffers as a basis for his sentence other than death." App.p. 1600, ll. 18-24.

counsel's argument and the instructions insured that the jury consider a wide array of evidence and circumstances, both aggravating and mitigating, as well as the impact of the crime on the victims and their survivors. Accord Blystone v. Pennsylvania, 494 U.S. 299 (1990)(sentencing scheme is constitutional so long as jury is able to consider and give effect to all relevant mitigating circumstances).

Under the state supreme court's reasoning, the prosecutor's passing reference on whether the lives of the two Murphree sisters were worth at least the life of Hall, would have caused the jury to make an allegedly impermissible comparative worth analysis and ignore the trial judge's instructions. Neither the intent of the prosecution comment nor the effect of it would have caused the jury, to a reasonable likelihood, to have avoided consideration of the evidence and instruction and to have based their decision *solely* upon a balancing of comparative worths. Both his counsel's argument and the instructions insured that the jury consider a wide array of evidence and circumstances, both aggravating and mitigating, as well as the impact of the crime on the victims and their survivors. Accord, Blystone v. Pennsylvania, 494 U.S. 299 (1990)(sentencing scheme is constitutional so long as jury is able to consider and give effect to all relevant mitigating circumstances).

Hall may continue to rely upon State v. Storey, 901 S.W.2d 886 (Mo. 1995). This reliance is misplaced. In Storey, the prosecutor stated the entire issue "comes down to one basic thing. Whose life is more important to you. Whose life has more value." Id. at 902. No such simplistic argument was made here. The prosecution argument directed the jury's attention to the law - not to abandon it. The characterization to the contrary must be rejected.

The state court may have overlooked that its interpretation of the closing argument takes the entirety of the prosecutor's argument out of context. See Humphries v. Ozmint, 366 F.3d 266, 288 (4th Cir. 2004) (Hamilton, J. concurring in part and dissenting in part), (petition for rehearing en banc granted, oral argument en banc held Oct. 2004). As discussed by the dissent in Humphries v. Ozmint, however, "[t]he fatal flaw in [this Court's] analysis is that a victim-to-defendant comparative worth argument is not prohibited by Supreme Court precedent, let alone 'clearly established' precedent. For good reason, in fact, even the majority today recognizes that victim-to-defendant comparisons are 'inescapable in light of the Payne decision.' Ante at 277." Id.

Further, the dissent in Humphries proper reasoning in a similar context is applicable here:

> One of the reasons proffered by the Supreme Court supporting its decision in Payne was that the states have a legitimate interest in introducing evidence of a victim's personal characteristics and evidence of the harm caused to the victim's family and society by the defendant's actions to counteract the mitigating evidence presented by a defendant. 501 U.S. at 825, 111 S.Ct. 2597. Whether the victim-impact evidence counteracts the defendant's mitigating evidence is a question, asking the jury to make a comparison between the victim-impact evidence and the defendant's mitigating evidence. In this case, in determining the appropriate sentence, the jury was asked to consider Dickie Smith's personal characteristics, the harm caused to his family and society by Humphries's actions, and Humphries's mitigating evidence, which

included evidence of Humphries's personal characteristics, both good and bad. Thus, the solicitor's year-by-year chronology comments were within the boundaries of a question the jury was required to consider--the blameworthiness of Humphries.

Of course, allowing the introduction of victim-impact evidence does not, and should not, open the door to evidence/argument ultimately allowing the jury to make a comparative inquiry between the victim and other victims in society, as the Court in Payne apparently recognized. Id. at 827, 111 S.Ct. 2597. A victim-to-victim comparison is certainly more pernicious than a victim-to-defendant comparison because, not only does it invite a commentary on collateral evidence not properly before the jury (the worthiness of other members (victims) of society), it does not counteract the defendant's mitigating evidence, which was one of the main goals of Payne.

Put simply, clearly established Supreme Court precedent does not prohibit victim-to-defendant comparisons; they are inevitable in any capital case in which the jury is asked to assess the persuasive force of the defendant's mitigating evidence and the victim-impact evidence. A consequence of Payne is that a defendant can be put to death for the murder of a person more "unique" than another, even though the defendant is, in fact, unaware of the victim's uniqueness. This does give some pause for concern, as does the notion

> that, under Payne, a sentence of death can turn on the severity of the harm caused to the victim's family and society, even though the defendant did not know the victim or the victim's family. However, these are inevitable consequences of the Payne framework; a framework that we, as judges of an inferior court, are without liberty to change.
>
> Because Humphries cannot show that the solicitor's comments were improper, my analysis could end right here. However, even if we need to get to the issue of prejudice, it is evident that Humphries was not prejudiced by the solicitor's year-by-year chronology.

Id. at 288-89 (Hamilton, J. dissenting) (emphasis added). Certiorari is warranted to resolve that counsel was not ineffective when they failed to object to a constitutional appropriate argument.

3. A Conflict Exists Among Jurisdictions On Whether Victim-Defendant Comparisons or The Worth of the Victim Can Be Argued Under Payne v. Tennessee.

The Petitioner recognizes that there may be a conflict within the lower court jurisdictions that it may be appropriate for this Court to resolve.[5] However, there is a weight of authority which allows similar arguments as was done in the instant case. In Jackson v. State, 33 S.W.3d 828

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[5]The Petitioner is aware that the decision in Humphries v. Oxmint, 366 F.3d 266 (4th Cir. 2004) is presently abrogated due the granting of the petition for rehearing en banc.

(Tex.Crim.App.2000), the Texas court addressed a similar issue. The appellant argued the Texas trial court erroneously overruled his objection to the prosecutor's jury argument at punishment that compared the value of appellant's life to the lives of the victims. The prosecution argued:

> "No reason to give this person a life in the penitentiary sentence because he has worked hard in this incident to earn the verdict you're going to give, the verdict the law demands, the verdict the facts demand and the verdict you will always be comfortable with whenever you rise, whenever you set, whenever you go about your business you will be comfortable that you made the right decision to give this man a life sentence to say there are mitigating factors there or to say he is not a continuing threat is to mean that his life is more important than Sharon Jackson's, than Ericka or Sonny's. [Sic]."

The trial court overruled appellant's objection that this argument was "asking the jury to make a comparative judgment based on value of life on victim versus the defendant."

Relying on Payne, appellant argued that a prosecutor may not compare the worth of a victim to a defendant's worth. The Texas court also found this to be an incorrect reading because Payne discourages "measuring the worth of the victim compared to other members of society." See Payne, 111 S.Ct. at 2607 (victim impact evidence should not encourage "a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy"). The Texas court found that the prosecution's argument did not do this. It

did not use the victim impact evidence for a purpose prohibited by Payne.

The North Carolina Supreme Court recently addressed Payne evidence and argument in State v. Haselden, 577 S.E. 2d 594 (2003) in finding a prosecutor's closing argument at penalty phase of capital murder trial, that "If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than [the victim's] life," was a natural and proper extension of prosecutor's earlier, and proper, argument concerning victim impact evidence. The court found no error in a prosecution closing argument where the prosecutor first compared the age of defendant to the age of the victim and the age of the victim's daughter. The prosecutor next contrasted the mitigating circumstance that defendant was considerate and loving to his mother by referencing the victim's mother in the courtroom. All of these factors, the victim's age, the age of the victim's daughter, and the effect of the murder on the victim's mother and found all "were relevant considerations for the jury, " according to the court. The prosecutor in this case properly offered victim-impact evidence for the jury's consideration. Victim-impact evidence is one way for the prosecution to counteract the defendant's mitigating evidence. See Payne, 501 U.S. at 821-24, 111 S.Ct. at 2607-08, 115 L.Ed.2d at 734. In the present case, defendant requested, and the trial court submitted, numerous mitigating circumstances concerning defendant's life. Among these mitigating circumstances were: (1) defendant is considerate and loving to his mother; and (2) as a child, defendant was sweet, loving, and obedient. The prosecutorial argument at issue here simply reminded the jury that in addition to considering defendant's life, the jury should also consider the life of the victim. See id. at 821-24, 111 S.Ct. at 2607-08, 115 L.Ed.2d at 734. The prosecution argument was seen as a "natural and proper extension of the prosecutor's earlier argument concerning victim impact evidence."

In State v. Ringo, 30 S.W.3d 810 (Mo. banc 2000) the court found that the rationale of permitting this victim impact and character evidence is to illustrate that "the victims are individuals whose deaths represent a unique loss to society and their family and that the victims are not simply 'faceless strangers, ' "citing State v. Roberts, 948 S.W.2d 577, 604 (Mo. banc 1997) (quoting Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). The Missouri court therein found that the record revealed the state explained the hardships suffered by the victims' families as compared to those borne by defendant. The prosecutor argued from permissible victim impact evidence and did not, as defendant complains, attempt to weigh the relative values of defendant's life compared to others. The court found no abuse of discretion. Compare, State v. Storey, 901 S.W.2d 886 (Mo. 1995)(error found).

In U.S. v. McVeigh, 153 F.3d 1166, 1176-1179 (10th Cir.1998), the court found that numerous witnesses testified about the professional and personal histories of victims who perished in the bombing, including reflections on the admirable qualities of the deceased. The 10th Circuit held that victim histories revealed the unique qualities of a murdered individual and his or her life accomplishments which constitute the core impact evidence describing a victim's "uniqueness as an individual human being" allowed by Payne. Payne, 501 U.S. at 823, 111 S.Ct. 2597; and cited Wiley v. Puckett, 969 F.2d 86, 105 (5th Cir.1992) (victim's wife properly testified about places she and her husband had lived and her husband's character).

In Smith v. State, 797 So.2d 503 (Ala.Cr.App. 2000) the court held that "a prosecutor may present and argue evidence relating to the victim and the impact of the victim's death on the victim's family in the penalty phase of a capital trial."citing Hyde v. State, 778 So.2d 199 (Ala.Cr.App.1998). The Alabama court further held that the prosecutor may also

properly refer to the victim's characteristics at the sentencing stage of a capital case. Payne, 501 U.S. at 824-25 [, 111 S.Ct. 2597]. The court determined that the holding in Payne v. Tennessee, "was based in large measure on the premise that this type of evidence related to the harm done by the defendant and, consequently, was a valid consideration in determining punishment to be imposed." ' Price v. State, 725 So.2d 1003, 1034 (Ala.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999). The Court stated that it had reviewed the prosecutor's allegedly improper remarks about [the victim] and concluded that those comments were proper comments about her characteristics. ' "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered an individual, so too the victim is an individual whose death represents a unique loss to society and, in particular, [to the victim's] family." Moreover, the trial court in this case instructed the jury that comments of counsel were not evidence. See also Grey v. Bowersox, 281 F.3d 749 (8th Cir. 2002) (admission of evidence of victim's political activities and reference to it in closing not an Eighth Amendment violation).

The Petitioner recognizes that there may be a conflict within the lower court jurisdictions that it may be appropriate for this Court to resolve. In the lower court, Hall contended that the weight of other state court decisions is against the South Carolina position. He relied upon some language from the New Jersey Supreme Court opinion in State v. Koskovich, 168 N.J. 448, 776 A.2d 144, 183 (2001). The setting of the language in Koskovich must be taken into account because the jury was given an instruction to determine in a "weighing" state that directed the jurors to weigh the victim impact evidence against the characteristics of the defendant. Particularly significant to the case, the New Jersey court noted that it had

earlier emphasized the limited role of victim impact evidence to assist the jury in the catch mitigating factor and not as a means a means "of weighing the worth of the defendant against the worth of the victim." Applying those tenets, the court addressed the defendant's argument that the trial court impermissibly instructed the jury to "balance" defendant's background against that of the victim, Jeremy Giordano." It concluded that the instructions were in error because, in fact it caused the evidence to be used for a different purpose in weighing the existence of the statutory factors in violation of its precedent. In addition, unlike Koskovich, the trial judge in Hall also instructed the jury not to allow passion prejudice, bias, or other arbitrary factor to affect their judgment. App.p.1575-76.

In the state court, Hall noted the relative scarcity of cases concerning with "comparative worth" arguments being raised as Payne violations. He suggested that this indicates that prosecutors generally recognize that these arguments are unacceptable and must be avoided. As with any layman statistical evidence no such suggestion can be made. The same assertion could be that prosecutors, defense counsel and courts recognize that Payne allowed for evidence of the victim's unique characteristics to be presented to a capital jury, even when the defendant's own unique characteristics were also presented to the jury. Second, these parties, as noted in the Texas case in Jackson, that Payne declared "victim impact evidence is not generally offered to encourage comparative judgments that a capital defendant **whose victims was an asset to the community** is more deserving of punishment than a defendant **whose victim is perceived to be less worthy**, but is designed instead to show each victim's uniqueness as an individual human being, whatever, the jury might think of the loss to the community resulting from the death." This also did not declare that it was constitutional improper to evaluate the life of the victim and the life of the defendant. In fact, Payne recognized that such information was constitutionally relevant.

4. SUMMARY.

In summary, certiorari is warranted because the Supreme Court of South Carolina misapprehended and misapplied the precedent of this Court in the following respects:

1. Misapplied Strickland in assessing counsel performance in 1991 to require him to anticipate the change in the law, a change not determined until the instant decision as recognized by the South Carolina Supreme Court's own 2002 opinion as not existing at that time based upon its review in 2002 of the Court's own and U.S. Supreme Court precedent.

2. Misapplied Payne v. Tennessee, in apparently making a new constitutional standard for closing arguments which forbid victim-defendant comparisons when "*clearly established Supreme Court precedent does not prohibit victim-to-defendant comparisons; they are inevitable in any capital case in which the jury is asked to assess the persuasive force of the defendant's mitigating evidence and the victim-impact evidence.*"

3. Misapplied Strickland in its prejudice prong analysis wherein it ignores the fact that had an objection been made in 1991 and overruled by then 1991 trial court under existing precedent, it would have affirmed the sentence based upon its own analysis as recognized in Humphries.

4. Since the argument was not constitutional error, it could not be prejudicial under Strickland.

5. A conflict exists among the jurisdictions on whether victim-defendant comparisons are prohibited under the Sixth, Eighth or Fourteenth Amendments.

6. Even if error, the South Carolina Supreme Court ignored that the brief comment was not the focus of the argument, which involved Hall's resisting arrest, multiple crimes against the victim and his own criminal history and record. It is clear that in reviewing prosecution arguments, a reviewing court must consider the argument in its entirety to determine if the references so infected the trial with unfairness so as to deprive the defendant of due process, Darden v. Wainwright, 477 U.S. 168 (1986). The lower court's narrow focus on these comments alone did not review the argument in its entirety.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted to review the judgement of the Supreme Court of South Carolina.

Respectfully submitted,
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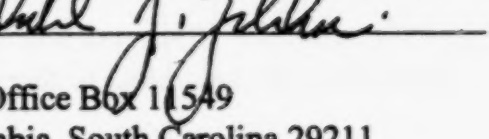
By: 

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December 8, 2004

APPENDIX I

360 S.C. 353, 601 S.E.2d 335

Supreme Court of South Carolina.

Larry Eugene HALL, Petitioner,

v.

William D. CATOE, Director, South Carolina Department of Corrections,

Respondent.

No. 25850.

Submitted March 17, 2004.
Decided Aug. 9, 2004.
Rehearing Denied Sept. 9, 2004.

****336 *355** Teresa L. Norris and Jerome H. Nickerson, of the Center of Capital Litigation, both of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

***356** Chief Justice TOAL:

We granted certiorari to determine whether the post-conviction relief (PCR) court erred by denying inmate Larry Hall ("Hall") relief on the death sentence he received as a result of a murder conviction. We remand Hall's case for a new sentencing proceeding.

****337** FACTUAL/PROCEDURAL BACKGROUND

In July 1991, Hall committed a series of crimes in an Easley Wal-Mart parking lot. To begin, Hall robbed and sexually assaulted his first victim at gunpoint. Hall then ordered her to walk to the back parking lot with him. A Wal-Mart employee noticed Hall's strange behavior and drove a truck through Hall and the victim's path. Hall allowed her to escape and then walked into the woods behind the store waving his gun in the air.

A half hour later, Hall approached two teenage girls, who were sisters, in the back parking lot. In front of numerous witnesses and without provocation, Hall shot and killed the two girls. When the police arrived and finally cornered Hall, he challenged the police with a piece of wood and dared the police to shoot him.

Hall has both mental and physical disabilities. He currently takes, and was taking during trial, Dilantin and Phenobarbital to prevent epileptic seizures. Dilantin has a sedative effect similar to the effects of alcohol. At the time of his arraignment, Hall had twice the amount of Dilantin in his bloodstream than the normal therapeutic amount. [FN1] Hall's sister, mother, and former employer all testified that Hall's seizures and medications make it very difficult for him to complete simple everyday tasks and that he is often in a "daze" or "in the fog." Hall has a "grossly abnormal" EEG, [FN2] as the result of his having epilepsy.

> FN1. Dr. James Brice, Hall's family physician, saw Hall shortly after the court hearing. Dr. Brice ordered blood tests, which revealed that Hall's Dilantin level was 39. The normal therapeutic range is 10-20.

FN2. An EEG (electroencephalograph) monitors the electric impulses of the brain, allowing doctors to detect and diagnose brain dysfunction.

*357 Hall has been diagnosed with "sensory dysfunction," deficient language abilities, and deficient organizational abilities. He suffers from both organic personality disorder--which may cause uncontrollable mood shifts and outbursts of aggression--and schizoid personality, which makes Hall indifferent to praise or punishment. Hall is also borderline mentally retarded, having an IQ of 72.

In August 1991, six months before Hall's trial, a group of doctors at the Hall Institute in Columbia evaluated Hall and found him competent to stand trial. One doctor, however, testified that Hall's competency was "borderline" and a "touch and go" issue. Hall was not evaluated again before his trial.

During closing argument, the solicitor directed the jury to weigh the worth of Hall's life against the lives of Hall's victims: "[w]hat are the lives of these two girls worth? Are they worth at least the life of a man, the psychopath, this killer who stabs and stabs and kills and rapes and kidnaps?" Hall was then convicted of murder, kidnapping, first-degree criminal sexual conduct, armed robbery, and resisting arrest and was sentenced to death.

Hall subsequently applied for PCR, and the PCR judge denied relief directing the state to draft an order, which the trial judge adopted in full, without alterations. This Court granted certiorari to review the following issues:

I. Did the PCR judge err in applying a heightened burden of proof to determine whether Hall was competent to stand trial?

II. Was Hall's trial counsel ineffective for failing to object to the solicitor's closing argument, which compared the worth of Hall's life to the victims' lives?
III. Did the PCR judge err in adopting the state's proposed order in its entirety?

LAW/ANALYSIS
Standard of Review

[1] This Court must determine whether any probative evidence exists to support the denial of post-conviction relief. *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). ***358** If any probative evidence exists, the PCR judge's ruling should be upheld. *Id.*

****338** I. COMPETENCY TO STAND TRIAL
A. Burden of Proof

[2] Hall argues that the PCR judge applied the wrong standard of proof in deciding whether Hall was competent to stand trial. We disagree.

[3][4] A defendant must prove that he is incompetent to stand trial by a "preponderance of the evidence." *State v. Reed,* 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998). Holding a criminal defendant to a "clear and convincing" burden to prove incompetence is a violation of due process. *Cooper v. Oklahoma,* 517 U.S. 348, 350, 116 S.Ct. 1373, 1375, 134 L.Ed.2d 498 (1996).

In his order, the PCR judge stated that Hall failed to establish "with credible and convincing evidence" that he was incompetent to stand trial. Hall argues that "credible and convincing" evidence is synonymous with "clear and

convincing" evidence, which is not the appropriate standard of proof for determining a defendant's competency to stand trial. However, after reviewing the order in its entirety, we find that the trial judge used the correct burden of proof--a preponderance of the evidence. In fact, the PCR judge noted several times that Hall must prove his incompetence by a "preponderance of the evidence."

First, in his order, the PCR judge stated that "[i]n a state post-conviction relief hearing, the Applicant also bears the burden of proof and he is required to show by a preponderance of the evidence that he is entitled to relief. Rule 71.1(e), SCRCP. This Court finds that he has failed this burden."

Second, in finding that Hall was not prejudiced by ineffective assistance of counsel, the PCR judge stated, "Hall has a burden of proof at trial to show by a preponderance of the evidence that he was incompetent. This Court finds, to a reasonable probability, he has failed in his burden."

We note that the PCR judge's order should have been amended to exclude the "credible and convincing" language, alleviating any doubt concerning which standard the PCR *359 judge applied. Nevertheless, after reviewing the order in its entirety, we find that the judge applied the proper standard--preponderance of the evidence--to determine whether Hall was competent to stand trial.

B. Evidence of Petitioner's Competency to Stand Trial

[5] On July 16, 1991, three days after Hall's arrest, the trial court ordered Hall to be evaluated for his competency to stand trial. A group of doctors at the Hall Institute found Hall to be competent to stand trial, with one doctor reporting that

Hall's mental state was a "close call" and a "touch and go" issue. Since the 1991 evaluations, the parties have accumulated a mass of evidence and engaged in a "battle of the experts" as to Hall's competency to stand trial. Hall argues that, although he was found competent in August 1991, he was not competent during his trial, which took place in January 1992. We find a sufficient amount of evidence supporting the PCR judge's conclusion that Hall was competent to stand trial.

[6] Conviction of a criminal defendant who is not competent to stand trial violates the due process clause of the fourteenth amendment. *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). This Court has held that to be competent to stand trial or continue trial, a defendant must have "a rational, as well as factual, understanding of the proceedings against him" and the "ability to consult with his lawyer with a reasonable degree of rational understanding." *State v. Bell,* 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing *Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)).

[7] If there is "any evidence of probative value to support the post conviction judge's factual findings," we must affirm. *Cherry,* 300 S.C. at 119, 386 S.E.2d at 626. Nevertheless, if the PCR judge makes an error of law, then this Court must reverse. *Pierce v. State,* 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). In addition, the PCR judge has the duty to weigh the credibility of the doctors who have testified as to Hall's competency to stand trial. If the testimony supports the PCR judge's findings, then the findings should be upheld. *Solomon v. State,* 313 S.C. 526, 443 S.E.2d 540 (1994); *Wade v. **339 State,* 308 S.C. 552, 419 S.E.2d 781 (1992) (a finding that testimony in ***360** support of allegations was unconvincing, without credibility, and untruthful will be upheld on appeal).

This Court has held that the PCR judge erred in granting relief on the basis that the defendant was not competent to stand trial when (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. *McLaughlin v. State,* 352 S.C. 476, 575 S.E.2d 841 (2003).

Hall presents several arguments that he was incompetent to stand trial: (1) he has been diagnosed with an antisocial disorder; (2) his trial counsel testified that he believed that Hall was not competent during trial; (3) Hall suffered from a seizure the night before sentencing, indicating that he could have experienced periods of incompetency; (4) during trial, he had taken abnormal doses of Dilantin causing him to be groggy and sedated; and (5) his low IQ indicates he has the intelligence of an average eleven-year-old.

Conversely, the state presents a sufficient amount of probative evidence that Hall was competent to stand trial: (1) in August 1991, several psychologists conducted an extensive evaluation of Hall and found him to be competent to stand trial; (2) Dr. McKee, who evaluated Hall from July 23, 1991 to August 8, 1991, found that "his answers to his questions were well associated, goal directed and relevant; there was no evidence of delusional thinking" and that he was capable of "understanding and participating in his defense and is capable of understanding the charges against him"; (3) one of Hall's defense counsel, Dallas Ball, testified in a May 29, 1997 deposition that "[i]n the discussions with Mr. Hall throughout the case ... [Hall] understood what he was facing, and he

listened to the testimony each day as to what was said against him, and he understood what was going on"; (4) during the PCR hearing, defense counsel, Christopher Olson (Olson), testified that Hall told him that he shot the other girl because she was an eyewitness to the first shooting, indicating that Hall knew the consequences of his actions; and (5) Olson also *361 testified that none of the doctors indicated any need to reevaluate Hall before trial.

We find that a sufficient amount of probative evidence exists to support the PCR judge's ruling that Hall was competent to stand trial. Moreover, given that the PCR applied the correct burden of proof, we hold that the PCR judge correctly determined that Hall was competent to stand trial.

II. CLOSING ARGUMENT

[8] Hall argues that trial counsel was ineffective because counsel failed to object when the solicitor made the following statement in his closing argument:

> I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the [lives of the two girls were] worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps.

Hall argues that his trial counsel's failure to object allowed the solicitor to charge the jury with an arbitrary, misconceived sentencing analysis, violating Hall's right to due process. We agree.

[9][10] A criminal defendant is constitutionally entitled to effective representation. *Rogers v. State,* 261 S.C. 288, 199 S.E.2d 761 (1973). In order to find trial counsel ineffective, this Court must find that counsel's conduct was deficient and that the deficiency prejudiced the outcome of the trial. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In the past, the United States Supreme Court (USSC) did not explicitly recognize the state's right to offer victim impact evidence in a criminal trial. In *Booth v. Maryland,* the USSC "left open the possibility that the kind of information contained in victim impact statements could be admissible if it 'related directly to the circumstances of the **340 crime.' " 482 U.S. 496, 507, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)). Additionally, in *South Carolina v. Gathers,* the USSC affirmed this Court's ruling that "victim impact statements in capital sentencing proceeds violate [the] principle that a sentence of death must *362 be related to the moral culpability of the defendant." 490 U.S. 805, 810, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

But in 1991, the USSC overruled *Gathers* and *Booth,* holding:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than any other relevant evidence is treated.

Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

[11] In other words, "[v]ictim impact evidence, as any other relevant evidence, is admissible so long as it is not so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* However, "[a]s a general matter, victim impact evidence is not offered to encourage comparative judgments of this kind--for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." *Id.* at 823, 111 S.Ct. at 2607 (emphasis added). Under a similar line of reasoning, this Court held that a criminal defendants reprehensibility was not mitigated by the fact that the victim was a murderer himself. *State v. Gaskins,* 284 S.C. 105, 326 S.E.2d 132 (1985).

At first glance, our decision in *Humphries v. State* appears to allow a solicitor to compare the lives of a criminal defendant with that of the defendant's victim. 351 S.C. 362, 376, 570 S.E.2d 160, 168 (2002). Nonetheless, we do not extend *Humphries* to permit the state to encourage the jury to compare the worth of a defendant's life with that of his victims. In *Humphries,* we upheld Humphries's death sentence and held that the solicitor's comparison of the lives of Humphries and his victim was within the realm of permissible victim impact evidence. In *Humphries,* defense counsel, attempting to mitigate the effects of the state's evidence concerning the brutality ***363** of the murder, elicited testimony that Humphries was a victim of parental abuse, substance abuse, and poverty as a child. [FN3]

FN3. Humphries presented thirteen witnesses who testified as to his cruel childhood.

In his closing argument, the solicitor responded by comparing the lives of Humphries and his victim. Although both Humphries and his victim were reared in impoverished conditions, Humphries was in and out of jail while the victim maintained an ordinary, crime-free life. We held that the solicitor's argument was permissible victim impact evidence. [FN4]

> FN4. We recognize that the Fourth Circuit recently granted Humphries federal habeas corpus, finding that the state (1) compared the worth of Humphries's life with that of his victim and (2) did so for the primary purpose of "exhort[ing] the jury to return a death sentence on the basis of the [defendant's] relative lack of worth." *Humphries v. Ozmint,* 366 F.3d 266, 271 (4th Cir.2004). We also take notice that the Fourth Circuit granted the state's petition for rehearing *en banc* and will rehear the case in October 2004. Nevertheless, we disagree that the victim-defendant comparison found in our account of *Humphries* is as prejudicial as the comparison in the present case. We continue to distinguish the facts of *Humphries* with that of the present case and maintain that these factual differences yield a different result as a matter of law. Our interpretation of the law coincides most congruently with Senior Judge Hamilton's dissent in the Fourth Circuit's recent account of *Humphries:*
>
> [A]llowing the introduction of victim-impact evidence does not, and should not, open the door to evidence/argument ultimately allowing the jury to make a comparative inquiry between the victim and other victims in society, as the court in *Payne* apparently recognized.

> ... Put simply, clearly established Supreme Court precedent does not prohibit victim-to-defendant comparisons; they are inevitable in any capital case in which the jury is asked to assess the persuasive force of the defendant's mitigating evidence and the victim-impact evidence.
> *Id.* at 288.
> We recognize that those victim-to-defendant comparisons that render a trial fundamentally unfair and those victim-to-defendant comparisons that are permissible are not always clearly distinguishable. A comparison that constitutes permissible victim-impact evidence is not as prejudicial to a defendant as a comparison that imposes, what in effect is, an arbitrary, unfounded jury charge.

**341 Again, the solicitor's argument in Hall's trial is distinguishable from the solicitor's argument in *Humphries*.

In *Humphries* we recognized that it is more prejudicial for the state to compare the worth of the life of the defendant ***364** with that of his victim than it is to compare their lives based on the evidence presented. *Id.* at 374, 570 S.E.2d at 167-168. In the present case, the solicitor not only suggested that Hall's life was worth less than his victims', he developed an arbitrary formula whereby if the jury finds Hall's life worth less than his victims', then the jury could reach no other conclusion than that the death penalty is justified.

Further, while the solicitor in *Humphries* compared the histories of Humphries's and his victim's lives, the solicitor in *Hall* asked the jury to compare the worth of Hall's life with that of his victims'.

We hold that the solicitor impermissibly compared Hall's life to the victims' lives. We find that the solicitor's comparison (1) was so emotionally inflammatory that it became a material part of the jury's deliberation process; (2) unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall's life was worth less than the lives of his victims; (3) is totally unrelated to the circumstances of the crime; and (4) is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victims or the victims' family.

For these reasons, we hold that Hall was denied his constitutional right to effective assistance of counsel when his trial counsel failed to object to the solicitor's comparison between the worth of Hall's life and the lives of the victims.

III. ADOPTION OF THE STATE'S PROPOSED ORDER IN FULL

[12] Hall argues that the PCR judge erred in adopting the state's proposed order because the order did not resolve issues of fact, indicating that the judge did not render an independent judicial judgment. We disagree.

The commentary to South Carolina Appellate Court Rule 501, Canon 3 B(7)(e) provides that "[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." Further, in *Pruitt v. State,* this Court directed that:

> *365 [c]ounsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP....

310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992).

On November 12, 1999, after receiving a request from the PCR judge to do so, the state submitted a proposed order to both the judge and opposing counsel. On November 14, 1999, the PCR judge told the parties that he would "carefully review the proposed order and insure that the facts and conclusions of law are as I find them to be."

[13] Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. Further, Hall waived his right to make this challenge when he failed to file a motion to alter or amend the order. *Id.*

****342** CONCLUSION

We REVERSE the PCR court on the basis that Hall's counsel was ineffective for not objecting to the solicitor's closing argument, which included an instruction to the jury to

-O-

compare the worth of Hall's life with the lives of his victims. Accordingly, we REMAND for a new sentencing proceeding. Finally, we affirm the PCR judge's ruling on the remaining issues.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

APPENDIX II

LETTER ORDER DENYING PETITION FOR REHEARING - September 9, 2004

The Supreme Court of South Carolina
Daniel E. Shearouse
Clerk of Court

September 9, 2004

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

Re: Hall, Larry Eugene v. Catoe, William

Dear Counsel:

The Court Issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/	Jean Toal	C.J.
s/	James E. Moore	J.
s/	John H. Waller Jr.	J.
s/	E. C. Burnett, III	J.
s/	Costa M. Pleicones	J.

September 9, 2004"
The remittitur is today being forwarded to the lower court.

(2)

04-808

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JON A. OZMINT, Director, South Carolina Department of Corrections,
Petitioner and Cross-Respondent,

v.

LARRY EUGENE HALL,
Respondent and Cross-Petitioner.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent and Cross-Petitioner, Larry Eugene Hall, through the undersigned counsel, asks leave to file the Brief in Opposition to the Petition for a Writ of Certiorari and to proceed *in forma pauperis*.

Hall was declared indigent prior to his trial in 1992. He has remained indigent and represented by court-appointed counsel since that time. He was previously granted leave to proceed *in forma pauperis* before this Court following affirmance of his convictions and death sentence by the South Carolina Supreme Court. *Hall v. South Carolina*, 512 U.S. 1246 (1994). He was also recently granted leave to file a Conditional Cross-Petition *in forma pauperis*.

Because of Hall's poverty, he is unable to pay the costs of these proceedings or give security therefor. An affidavit from Mr. Hall and an explanatory affidavit from the undersigned counsel are attached. An affidavit from Mr. Hall's appointed guardian, Desa A. Ballard, in support of this motion was previously submitted.

Teresa L. Norris

TERESA L. NORRIS

Center for Capital Litigation
P.O. Box 11311
Columbia, SC 29211
(803)765-0650

COUNSEL FOR LARRY HALL.

February 16, 2005.

04-808

IN THE SUPREME COURT OF THE UNITED STATES

JON A. OZMINT, Director, South Carolina Department of Corrections,
Petitioner and Cross-Respondent,

v.

LARRY EUGENE HALL,
Respondent and Cross-Petitioner.

AFFIDAVIT OF TERESA L. NORRIS

I, Teresa L. Norris, being first duly sworn, depose and say that I am a member of this Court's bar. I have been court-appointed counsel for Larry Eugene Hall, the Respondent and Cross-Petitioner in the above-entitled case, for the last 10 years.

On January 12, 2005, I submitted a conditional cross-petition for certiorari accompanied by a motion to proceed in forma pauperis for the cross-petition and the brief in opposition to the State's petition. I also submitted an affidavit from Mr. Hall's guardian reciting the facts necessary to establish Mr. Hall's indigence. On January 21, I was informed by Clayton Higgins of the Clerk's office that I needed to obtain Mr. Hall's signature on an affidavit. I explained to Mr. Higgins that I do not believe that Mr. Hall is mentally competent to understand the nature of these proceedings and that is why his guardian was asked to submit the affidavit. I was informed that I still needed to obtain an affidavit from Mr. Hall and that I should provide any explanation necessary in my own affidavit. I was also informed that I should submit separate motions and affidavits for the cross-petition and the brief in opposition.

With the assent of Mr. Hall's guardian, Desa Ballard, Esq., I have obtained Mr. Hall's signature on the affidavit of indigence, which is attached.

I declare under penalty of perjury that the foregoing is true and correct.

Teresa L. Norris

TERESA L. NORRIS

SWORN to and subscribed before me
this 10th day of Feb., 2005.

Notary Public
My Commission Expires: 8-29-08

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Larry Hall, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ n/a	$ n/a	$ n/a	$ n/a
Self-employment	$ n/a	$ n/a	$ n/a	$ n/a
Income from real property (such as rental income)	$ n/a	$ n/a	$ n/a	$ n/a
Interest and dividends	$ n/a	$ n/a	$ n/a	$ n/a
Gifts	$ 30.00	$ n/a	$ 30.00	$ n/a
Alimony	$ n/a	$ n/a	$ n/a	$ n/a
Child Support	$ n/a	$ n/a	$ n/a	$ n/a
Retirement (such as social security, pensions, annuities, insurance)	$ n/a	$ n/a	$ n/a	$ n/a
Disability (such as social security, insurance payments)	$ n/a	$ n/a	$ n/a	$ n/a
Unemployment payments	$ n/a	$ n/a	$ n/a	$ n/a
Public-assistance (such as welfare)	$ n/a	$ n/a	$ n/a	$ n/a
Other (specify): _____	$ n/a	$ n/a	$ n/a	$ n/a
Total monthly income:	$ 30.00	$ n/a	$ 30.00	$ n/a

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
n/a			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
n/a			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
n/a		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☒ Other assets
Description Prison Canteen
Value approx $19.00

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
n/a	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
n/a		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ n/a	$ n/a
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ n/a	$ n/a
Home maintenance (repairs and upkeep)	$ n/a	$ n/a
Food	$ n/a	$ n/a
Clothing	$ n/a	$ n/a
Laundry and dry-cleaning	$ n/a	$ n/a
Medical and dental expenses	$ n/a	$ n/a

	You	Your spouse
Transportation (not including motor vehicle payments)	$ n/a	$ n/a
Recreation, entertainment, newspapers, magazines, etc.	$ n/a	$ n/a
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ n/a	$ n/a
Life	$ n/a	$ n/a
Health	$ n/a	$ n/a
Motor Vehicle	$ n/a	$ n/a
Other: _____	$ n/a	$ n/a
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ n/a	$ n/a
Installment payments		
Motor Vehicle	$ n/a	$ n/a
Credit card(s)	$ n/a	$ n/a
Department store(s)	$ n/a	$ n/a
Other: _____	$ n/a	$ n/a
Alimony, maintenance, and support paid to others	$ n/a	$ n/a
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ n/a	$ n/a
Other (specify): Cigarettes	$ 30.00	$ n/a
Total monthly expenses:	$ 30.00	$ n/a

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been on death row since 1991.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Jan 25, 2005

Larry Hall
(Signature)

No. 04-808

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

JON E. OZMINT, Director, South Carolina Department of Corrections,
Petitioner,

v.

LARRY EUGENE HALL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF SOUTH CAROLINA

CAPITAL CASE

TERESA L. NORRIS
Center for Capital Litigation
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-0650

CAPITAL CASE

QUESTION PRESENTED

Whether the Supreme Court of South Carolina erred in ordering resentencing in a capital case in which, seven months after this Court decided *Payne v. Tennessee*, defense counsel failed to object to a prosecutor's closing argument that the state supreme court found, on the facts of the particular case, was objectionable because – in *Payne's* plain terms – it was so unduly prejudicial as to offend Due Process.

INTERESTED PARTIES

The following parties in addition to those named in the caption have an interest in the proceeding:

Desa A. Ballard, Esq.
226 State Street
West Columbia, SC 29169
phone: (803) 796-9299
fax: (803) 796-1066

(By order of the South Carolina Supreme Court dated August 4, 2004, attorney Ballard was appointed guardian for Larry Hall in his successor post-conviction relief action pending before the Court of Common Pleas of Pickens County, pursuant to Rule 1.14(b) of the Rules of Professional Conduct, Rule 407, SCACR.)

The State of South Carolina

TABLE OF CONTENTS

Question Presented i

Interested Parties ii

Table of Authorities iv

Statement of the Case 1

Reasons for Denying the Writ 3

Conclusion 9

TABLE OF AUTHORITIES

FEDERAL CASES

Booth v. Maryland, 482 U.S. 496 (1987) 1

Darden v. Wainwright, 477 U.S. 168 (1986) 8

Humphries v. Ozmint, 2005 W.L. 26794 (4th Cir. Feb. 4, 2005) (*en banc*) 6

Payne v. Tennessee, 501 U.S. 808 ..... 1, 2, 3, 5, 8

South Carolina v. Gathers, 490 U.S. 805 (1989) 1

Strickland v. Washington, 466 U.S. 668 (1984) 3

STATE CASES

Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004) 4, 5, 6, 7

Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) 6

State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) 2, 8

State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) 6

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 7

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioner Ozmint (hereafter "the State")[1] has filed this petition for *certiorari* seeking review of a decision of the Supreme Court of South Carolina ordering a new capital sentencing hearing for Respondent, Larry Eugene Hall (hereafter "Hall").

The Supreme Court of South Carolina held that the prosecutor's use of victim impact evidence during closing argument was unduly prejudicial and that Hall's lawyer rendered ineffective assistance of counsel in failing to object to it. In an effort to make the case appear *cert.*-worthy, the State's petition attributes to the state court rulings that the court never made and indeed *explicitly* rejected. The actual basis for the decision below is a fact-bound, case-specific ruling that presents no issue warranting this Court's consideration on *certiorari*.

STATEMENT OF THE CASE

On June 27, 1991, this Court decided *Payne v. Tennessee*, 501 U.S. 808. That decision overruled the Court's earlier holdings in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) that the Eighth and Fourteenth Amendments erected a categorical bar against "the admission of victim impact evidence and prosecutorial argument on that subject." *Payne*, 501 U.S. at 827. The Court in *Payne* said:

> "In the majority of cases ... victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."

---

[1]Since Ozmint is the Director of the South Carolina Department of Corrections appearing in his official capacity and represented by the State Attorney General, it will be clearer to refer to the Petitioner simply as "the State."

Payne, 501 U.S. at 825. The *Payne* opinion carefully explained the legitimate purposes for victim impact evidence in responding to the

> "concern voiced in *Booth*'s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth*, ... 482 U.S., at 506, n. 8. As a general matter, ... victim impact evidence is not offered to encourage comparative judgments of this kind for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."

Payne, 501 U.S. at 823.

On October 7, 1991, the Supreme Court of South Carolina filed its opinion in *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547, spelling out the relevance of *Payne* to future South Carolina capital sentencing hearings.

> "Recently, in *Payne v. Tennessee*, ... the United States Supreme Court restated the law regarding evidence and arguments as to the impact of the crime on the victim and the victim's family. In that opinion, the High Court for the first time held that in a capital sentencing proceeding such evidence is not per se inadmissible pursuant to the eighth amendment. The Court noted that 'the true measure of crimes is the injury done to society.'"

Johnson, 306 S.C. at 132, 410 S.E.2d at 555. The state court announced that victim impact evidence would be admissible under South Carolina criminal law, quoting *Payne* as follows:

> "We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated."

Id.

On January 24, 1992, the penalty phase of Hali's capital murder trial began. During closing argument, the solicitor argued that:

> "Every time a jury sits something special happens, and I am not talking about duty. I am talking about values, because a jury verdict is a statement of values."

App. 1568. He then proceeded to describe the "values" that the jury should declare through its verdict:

> "And I am not talking about dollars and cents as far as what the life of Wendy Murphree and Lori Murphree was worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth at least the life of this man, the psychopath, this killer who stabs and stabs and kills and rapes and kidnaps? The defense will say, well, taking his life will not bring these girls back. That is not what I am talking about folks. I am simply saying how profane, how profane to give this man a gift of life of twenty years or thirty years, however long it would be before he got out..."

App. 1568-1569. Defense counsel at this point objected to the mention of twenty or thirty years, the trial judge acknowledged that he would charge the law, and the solicitor proceeded with his closing argument uninterrupted. App. 1568-69.

REASONS FOR DENYING THE WRIT

The State's entire argument for *certiorari* depends on reading the South Carolina Supreme Court decision as expanding *Payne v. Tennessee*, 501 U.S. 808 (1991), and retroactively finding ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), based on this expansion. Both of these readings are manifestly wrong.

What the South Carolina Supreme Court below held – and so explicitly as to make any other reading a plain distortion of both text and law – was that the prosecutor's closing argument was sufficiently prejudicial as to have violated Hall's right to due process, *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004), a ground of objection identified in the *Payne* opinion seven months *before* Hall's sentencing trial. Hall's lawyer was held ineffective for failing to make this objection despite the unfairly prejudicial nature of the argument. The State's efforts to strain this narrow finding into a broad rule of law that would expand the protections afforded future South Carolina defendants under *Payne* are disingenuous.

The state court began its analysis by recapitulating the relevant, uncontroversial law regarding ineffective ass ance of counsel.

> "A criminal defendant is constitutionally entitled to effective representation. *Rogers v. State*, 261 S.C. 288, 199 S.E.2d 761 (1973). In order to find trial counsel ineffective, this Court must find that counsel's conduct was deficient and that the deficiency prejudiced the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984)."

360 S.C. at 361, 601 S.E.2d at 339. Under this standard it concluded that trial counsel's failure to object to a prosecutorial argument which was so prejudicial that it should have alerted counsel to an objection spelled out in those precise terms on the face of the *Payne* opinion itself denied Hall his constitutional right to effective assistance of counsel. *Id.*

To explain why the prosecutor's argument came within the Due Process prohibition recognized in *Payne*, the state court identified four impermissible characteristics of the

prosecutor's appeal to "values" in asking the jury to base a death sentence on a comparison between the worth of Hall's life and that of his victims:

> "the solicitor's comparison (1) was so emotionally inflammatory that it became a material part of the jury's deliberation process; (2) unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall's life was worth less than the lives of his victims; (3) is totally unrelated to the circumstances of the crime; and (4) is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victims or the victims' family."

360 S.C. at 364, 601 S.E.2d at 341. The impermissibility of each of these characteristics derives directly from this Court's explication of the permissible uses of victim impact evidence in *Payne*.[2]

In assessing trial counsel's failure to object, the Supreme Court of South Carolina did not **"deem[]" "Trial Counsel in 1991 ... deficient in not anticipating ... [a] 2004 change ... [in the law of] *Payne*"** (Petition for Certiorari, pp. 9-10) (emphasis in original). The court did not base its finding on any law established subsequent to *Payne* itself. Nor, indeed,

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[2] Each facet of *Hall*'s holding quoted immediately above tracks this Court's language in *Payne*: (1) "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825; (2) "As a general matter, however, victim impact evidence is not offered to encourage comparative judgments ... [but] to show instead ***each*** victim's 'uniqueness as an individual human being.'" *Payne*, 501 U.S. at 823; (3) "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825; (4) "A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 501 U.S. at 827.

has there *been* any change in the South Carolina Supreme Court's interpretation of *Payne*.[3] The State's reliance on *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002), to demonstrate a change is particularly misplaced because the holding in *Humphries* that *Payne* does not prohibit comparisons between the defendant and the victim as such was explicitly reaffirmed in *Hall* and found consistent with the *Hall* decision. 360 S.C. at 363 n.4, 601 S.E.2d at 340 n.4. The South Carolina Supreme Court ruled that "the solicitor's argument in Hall's trial is distinguishable from the solicitor's argument in *Humphries*" (360 S.C. at 363, 601 S.E.2d at 341) and that the *particular* argument made in *Hall* was unduly prejudicial.[4]

The State simply misdescribes the *Hall* decision that it asks this Court to review. In its petition for *certiorari*, the State describes the *Hall* case as aberrant and as holding "that victim-defendant comparisons are improper." This is not the holding of *Hall*. The South Carolina Supreme Court in *Hall* states unequivocally that it is holding the prosecutor's closing argument improper not because it compared victim with defendant, but because it did so in a way that was impermissible and prejudicial.[5] The State itself recognizes this

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[3] Indeed, in 1994, the South Carolina Supreme Court explicitly held that "a court may admit evidence of the specific harm done by a defendant so that a jury may meaningfully consider the defendant's blameworthiness at the sentencing phase of trial," but specified that such material should not be used "to encourage comparative character analysis." *State v. Southerland*, 316 S.C. 377, 385, 447 S.E.2d 862, 867 (1994).

[4] This was also the reading of the South Carolina Supreme Court's *Hall* and *Humphries* decisions by the Fourth Circuit *en banc*, denying Humphries federal habeas relief in *Humphries v. Ozmint*, 2005 W.L. 26794 *15-16 (4th Cir. Feb. 4, 2005) (*en banc*)).

[5] "In the present case, the solicitor not only suggested that Hall's life was worth less than his victims', he developed an arbitrary formula whereby if the jury finds Hall's life worth less than his

distinction under *Payne* through its repeated citation of *State v. Tucker*: "Victim impact evidence is clearly admissible because it slows [*sic*] the victim's uniqueness as an individual **so long as it does not render the trial unfair**." Petition for Certiorari, p. 14 (emphasis added) (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)).

The Supreme Court of South Carolina carefully observes this distinction and twice explains in *Hall* how its decisions in *Hall* and *Humphries* are consistent. First, it reiterates that its decision in *Hall* does not announce any general prohibition of victim-to-defendant comparisons. 360 S.C. at 363, 601 S.E.2d at 340. Second, it points to the facts of *Humphries* to explicate by contrast the prejudicial nature of the solicitor's argument in *Hall*. *Id* at 363-364, 601 S.E.2d at 340-341. It ultimately concludes:

> "[W]e disagree that the victim-defendant comparison found in our account of *Humphries* is as prejudicial as the comparison in [*Hall*]. We continue to distinguish the facts of *Humphries* with that of the present case and maintain that these factual differences yield a different interpretation as a matter of law."

360 S.C. at 363 n.4, 601 S.E.2d at 340 n.4. Yet, despite this unambiguous declaration, the State asks this Court to review *Hall* on the theory that *Hall* changes the law that *Humphries* declared "as recently as 2002." Petition for Certiorari, p. 11.[6]

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victims', then the jury could reach no other conclusion than that the death penalty is justified." 360 S.C. at 364, 601 S.E.2d at 340.

[6] The State goes so far as to claim that the sentence in *Hall* would have been affirmed by the South Carolina Supreme Court "based on its own analysis as recognized in *Humphries*" (Petition for Certiorari, p. 25) despite the repeated assertions of that very court that the two cases are consistent.

The State is obviously right that the performance of Hall's trial counsel cannot be judged by hindsight from 2004, but it is altogether wrong in claiming that this is what the South Carolina Supreme Court did. Rather, a correct understanding of the history of *Payne*'s reception into South Carolina jurisprudence – as opposed to the State's revisionist history – weighs heavily in *support* of the state court's finding of ineffectiveness.

Hall was tried a mere seven months after this Court decided *Payne*. As the State's brief indicates, the Supreme Court of South Carolina in this interim approved the use of victim impact evidence in *Johnson*. 306 S.C. at 132, 410 S.E.2d at 555. In light of these developments, any adequate defense counsel facing a capital prosecution for the murder of two young girls would have read the *Payne* opinion. The face of this opinion – and, for good measure, even the *syllabus* – articulates not only the ground for, but also the *name* of the objection that Hall's attorney failed to make. Its reminder that evidence "is admissible so long as it is not so unduly prejudicial that it renders the trial fundamentally unfair," *Payne*, 501 U.S. at 825, was no mysterious clue requiring prescience to unravel. *Payne* itself quoted this familiar rule from *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986).

In the wake of *Payne*'s explicit reference to *Darden*, any competent defense attorney trying a capital case in 1991 and confronted with a prosecutor's argument urging the jury to render through its verdict a "statement of values" and to assess whether the lives of the victims were "worth" that of defendant Hall would have been alerted to object. That is all the South Carolina Supreme Court below held, and its ruling to this effect presents no case for *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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February 10, 2005.

04-808

IN THE SUPREME COURT OF THE UNITED STATES

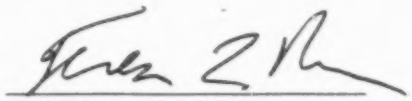
JON A. OZMINT, Director, South Carolina Department of Corrections,
Petitioner and Cross-Respondent,

v.

LARRY EUGENE HALL,
Respondent and Cross-Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for the Petitioner a copy of the Brief in Opposition to the Petition for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis in this action. Service was made by U.S. mail, first class, postage prepaid, to Donald J. Zelenka, Esq., Assistant Deputy Attorney General of South Carolina, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211. This the 10th day of February, 2005, in Columbia, South Carolina.



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